

At the preliminary hearing, claimant requested a choice of two physicians for treatment of a low back injury sustained in an October 13, 2013, work accident. The parties indicated to the ALJ the only issue was whether claimant refused to submit to a drug test requested by respondent. The ALJ issued a preliminary hearing Order denying claimant workers compensation benefits because claimant refused to take a drug test requested by respondent. The ALJ found that being observed by a nurse while undergoing drug testing was not an excuse for refusing to submit to the drug test. Further, the ALJ stated claimant made inconsistent statements and her credibility was in question.

Claimant appeals and asserts there was no probable cause to believe claimant had used alcohol or drugs on the date of her accident. Claimant argues that by requiring her to be observed by a nurse during the drug test, respondent was requesting a drug test performed outside of its policy in a manner to which she did not consent. Respondent asks the Board to affirm the preliminary hearing Order.

The issue before the Board is: did claimant refuse to submit to a drug test requested by respondent?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant alleges she sustained injuries as the result of an October 13, 2013, accident arising out of and in the course of her employment with respondent. At the preliminary hearing, the parties agreed the only issue was whether claimant refused to take the drug test requested by respondent. Therefore, the details of claimant's alleged accident, injuries and medical treatment will not be discussed in this Order.

When she went to work for respondent on April 8, 2013, claimant signed a document entitled, "Employee Acknowledgment Form." The form indicated it was claimant's responsibility to read and comply with the policies contained in respondent's employee handbook. The pertinent part of the employee handbook states:

All employees who have on-the-job injuries that result in a physician's visit and/or lost time will be required to submit to a drug/alcohol test.

Under Kansas Workers Compensation statute, violation of this policy may result in a total denial of Workers Compensation benefits. The law provides for a complete forfeiture of Workers Compensation benefits if the employee uses or is under the influence of drugs or alcohol.

Refusal to submit to a drug/alcohol test will be grounds for termination.<sup>1</sup>

Claimant, also on April 8, 2013, signed a document entitled, "Acknowledgment of Receipt of Drug/Alcohol-Free Workplace Policy."<sup>2</sup> That document has a provision stating:

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<sup>1</sup> P.H. Trans., Resp. Ex. 2.

<sup>2</sup> *Id.*, Resp. Ex. 3.

I understand that, from time to time, I may be requested to take drug/alcohol tests in accordance with the provisions of the Policy. I specifically agree to take such tests, and to be bound by the results thereof (subject to any right that I may have to obtain independent confirmation of such test results). I further understand that, if I refuse to take any drug/alcohol test that is requested by KMY [*sic*] in accordance with this Policy, I am subject to immediate discharge.<sup>3</sup>

Claimant testified that on the morning of October 18, 2013, she and her sister, Crystal, who also worked for respondent, went to respondent where Crystal delivered an accident report completed by claimant. Claimant was then contacted by Caryn Clothier, respondent's human resources director, by telephone and instructed to go to Via Christi for a drug screen. Claimant and her sister proceeded to Via Christi and arrived shortly after 9 a.m.

Claimant testified she waited at Via Christi around two hours until approximately 11:20 a.m., when she was taken by a nurse<sup>4</sup> for the drug screen. At her deposition, claimant testified that while waiting in the lobby, she received a telephone call from her mother asking to be picked up at work at 11:30 a.m.<sup>5</sup> because she was getting off work early. Claimant was instructed to take everything out of her pockets and place any items in a locker in preparation for drug testing. She was then escorted by the nurse to a bathroom to provide a urine sample. The nurse indicated respondent called and requested claimant be observed while providing the sample. Claimant testified she was shocked and embarrassed at the prospect of being observed during the drug test. Claimant indicated that Ms. Clothier, during their earlier telephone conversation, did not mention claimant would be required to be observed when providing a urine sample.

Claimant told the nurse she could not complete the drug test because she had to leave to pick up her mother. Claimant said she would come back after picking up her mother and take the drug test. The nurse told claimant she could come back later, but did not know what respondent would say. Claimant testified she left Via Christi to pick up her mother, but before returning to Via Christi, she received a telephone call from respondent indicating she was terminated for refusing to take the drug test. Claimant indicated she was gone 10 to 15 minutes and when she returned, Via Christi would not let her take the drug test.

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<sup>3</sup> *Id.*

<sup>4</sup> When testifying at her deposition and the preliminary hearing, claimant referred to the person accompanying her during the drug screen as "her," "she," "the lady" and "female nurse." For clarity and consistency, this Order will refer to that person as nurse.

<sup>5</sup> At the preliminary hearing, claimant indicated her mother requested to be picked up at 11:45 a.m.

When asked at her deposition why Crystal could not pick up their mother, claimant gave the following explanation: "No, because my sister -- my sister, they stayed out in the car and I was still in the lobby. And my sister -- my car was brand-new and I didn't really want her to drive."<sup>6</sup> Claimant acknowledged she had a cell phone and could have called her sister waiting in the car, who also had a cell phone, and asked her to pick up their mother.

At her deposition, claimant was asked why she did not complete the drug screen and gave the following testimony:

Q. It's my understanding the drug test was not completed?

A. Yes.

Q. Why is that?

A. I felt hu, hu, hu -- I can't say the word.

Q. Humiliated?

A. Yes, and I'm a very modest person and, you know, the employer told them to watch me.<sup>7</sup>

At the preliminary hearing, claimant testified she told the nurse: "I said well, I can't pee right now. I said I have to go pick up my mother and I'll be back."<sup>8</sup>

Claimant testified she did not use illegal drugs prior to the attempted drug test. She underwent two previous drug screens while working for respondent and the test results were negative. No one watched claimant provide a urine sample for the two prior drug screens. Claimant was aware of respondent's policy of taking a drug test, but did not understand being observed while giving the urine sample was part of the drug and alcohol policy.

Ms. Clothier testified she called claimant around 9:15 a.m. to 9:30 a.m. on October 18, 2013, and instructed her to go to Via Christi. Ms. Clothier did not tell claimant she would be observed during the drug screen. She later called Via Christi to make sure claimant arrived there and was told claimant had checked in around 11:30 a.m. Around 12:50 p.m., Ms. Clothier received a telephone call from Via Christi indicating claimant was

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<sup>6</sup> Claimant Depo. at 29.

<sup>7</sup> *Id.* at 26.

<sup>8</sup> P.H. Trans. at 31.

called back at approximately 12:30 p.m., was upset at having to wait, indicated she had to leave to go pick up her mother and left around 12:45 p.m. without taking the drug test.

Ms. Clothier confirmed she told the nurse to watch claimant while providing the urine sample. Ms. Clothier testified that upon learning of claimant's accident, she was informed by charge nurse Sherry Erdman there were rumors concerning claimant manipulating prior drug screens. Ms. Clothier did not investigate, as she only learned of the rumors that day and decided to require claimant be observed while giving a urine sample.

Ms. Clothier confirmed claimant underwent two prior drug screens while working for respondent and the test results were negative. She also confirmed claimant was not asked to be observed during the two prior drug tests. Ms. Clothier acknowledged that October 18, 2013, when she requested claimant be observed, was the first time Ms. Clothier had requested an employee be observed during his or her drug screen.

Ms. Clothier acknowledged respondent's employee handbook does not identify a specific drug test and there are several different types of drug tests. She insisted it can be part of respondent's policy to require an employee be observed while undergoing a drug test. Ms. Clothier agreed there is nothing in respondent's policy that specifically says an employee can be observed while undergoing a drug test.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2013 Supp. 44-501(b)(1)(E) states:

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

K.S.A. 2013 Supp. 44-501(b)(2) states:

The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

Claimant asserts respondent offered no evidence there was cause to believe claimant used drugs or alcohol on the date of the accident that contributed to the accident. Claimant indicated the issue then becomes whether claimant consented to the method in which the drug test was conducted, to wit: being observed while providing a urine sample. Claimant contends respondent's written policy did not authorize nor did respondent ever conduct a drug test in this manner.

Respondent had a mandated drug testing policy in place in writing prior to claimant's accident requiring all employees who had work injuries resulting in a physician's visit and/or lost time to undergo a drug/alcohol test. K.S.A. 2013 Supp. 44-501(b) does not require an employer's drug testing policy to specify the type of drug testing that will be conducted.

K.S.A. 2013 Supp. 44-501(b)(2)(C) allows drug testing where prior to the date and time of the accident or injury, the employee gives written consent to the employer she would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury. The Acknowledgment of Receipt of Drug/Alcohol-Free Workplace Policy signed by claimant indicated she agreed to take drug tests in accordance with respondent's policy. There is no statutory requirement that an employer must specify in the consent form the specific type of drug test to which the employee is consenting.

The foregoing arguments ignore the real issue in this claim, which is: did claimant refuse to submit to the drug test? If claimant had submitted to the drug test, then the ALJ would have been called upon to determine if there was a written mandated drug testing policy in place prior to claimant's accident requiring claimant to submit to drug testing or if claimant consented to the drug screen. Claimant did not provide a urine sample. Therefore, this Board Member need only determine if claimant's action of not providing a urine sample is a refusal under K.S.A. 2013 Supp. 44-501(b)(1)(E).

When asked to provide a urine sample, claimant did not do so and takes the position she did not refuse to take a drug test because she was asked to perform a drug test she did not consent to and was not authorized by respondent's policy. Claimant, in essence, argues if an employee believes neither of the circumstances set forth in K.S.A.

2013 Supp. 44-501(b)(2)(A) or (C) exists, the employee may refuse to take a drug test. That legal analysis disregards the language of K.S.A. 2013 Supp. 44-501(b)(1)(E).

The ALJ found claimant was not credible. At her deposition, claimant indicated she could not provide a urine sample because she had to pick up her mother. Claimant had a suspended driver's license and her sister was available to pick up their mother. Claimant indicated the prospect of being observed providing the urine sample was humiliating. Claimant also indicated she could not urinate. At the preliminary hearing, claimant offered the same reasons for not providing the urine sample. However, she also indicated she did not provide a urine sample because she had not consented to take a drug test while being observed and respondent's drug and alcohol policy did not specify she was required to be observed.

Claimant offers a number of excuses as to why she did not provide a urine sample and insists she did not refuse to take the drug test. Claimant's attempts to relabel or excuse her refusal to take the drug test are without merit. This Board Member finds claimant refused to provide a urine sample.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>10</sup>

**WHEREFORE**, the undersigned Board Member affirms the January 31, 2014, preliminary hearing Order entered by ALJ Jones.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>9</sup> K.S.A. 2013 Supp. 44-534a.

<sup>10</sup> K.S.A. 2013 Supp. 44-555c(j).

c: Phillip B. Slape, Attorney for Claimant  
pslape@slapehoward.com; dnelson@slapehoward.com

Michael L. Entz, Attorney for Respondent and its Insurance Carrier  
mike@entzlaw.com

Honorable Gary K. Jones, Administrative Law Judge